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SUBJECT: LIMITS ON TRADING AND DISTRIBUTION CONTINUE TO HAMPER  
U.S. BUSINESS

REF: A) HCMC 366 B) HANOI 1957 C) HCMC 879

1. (SBU) SUMMARY: U.S. businesses in southern Vietnam are frustrated by limits on trading and distribution rights. Many company representatives report that relevant BTA provisions are not being implemented effectively. One business that has been directly importing and selling its product for 10 years faces a claim by government authorities that its operating license does not permit it to import and sell directly. All strongly agree that broad freedom to directly trade and distribute a wide range of products must continue to be a key focus of WTO negotiations. END SUMMARY.

BTA OBLIGATIONS NOT BEING MET ADEQUATELY

2. (SBU) In meetings with EconOff, legal experts and company representatives have raised recurring concerns about trading rights and distribution services. When the U.S.-Vietnam Bilateral Trade Agreement (BTA) entered into force, U.S. companies could only directly import-export goods in connection with production or export activities. Most U.S. companies wanting to import goods for sale in Vietnam had and still have to go through a Vietnamese trading company. The situation is similar for distribution services. A U.S. firm must use a Vietnamese company to distribute its goods within Vietnam. Under phase-ins negotiated in the BTA, as of December 2004, U.S. companies in Vietnam engaged in manufacturing or U.S. companies with less than 50 percent equity in a joint venture with a Vietnamese enterprise should be able to import-export most goods directly. Similarly, as of December 2004, joint ventures with Vietnamese enterprises in the distribution services sector may be established, with U.S. companies holding no more than 49 percent equity. At least two U.S. companies attempted to avail themselves of these rights early in 2005, Gannon International (ref A) and American Indochina Management (AIM). Both were unsuccessful in their petitions to the GVN on this issue. In the case of AIM, the marketing, distribution and logistics company was told by MOT in January that the company would not be allowed to avail itself of these rights for the time being.

OTIS ELEVATOR CASE

3. (SBU) Another U.S. company, Otis, has been directly importing and selling its elevators in Vietnam since 1994, but now faces restrictions. According to a memo prepared by Otis' legal representatives, law firm Baker & McKenzie, following an attempt to bring in a shipment of elevators as it has done for the last 10 years, Otis was told in June that it is not allowed to directly import and sell and that its activities over the last 10 years have been beyond the scope of its license. This was the view of the Departments of Trade and Planning and Investment in Hanoi, where the import information was originally filed; it is unclear whether Otis will appeal to the Ministry of Planning and Investment on their case. According to some of Embassy's economic growth consultants in Hanoi, Otis's problems with its license are symptomatic of a more general problem for U.S. investors in Vietnam. Many old investment licenses contain provisions, such as trade related investment measures (TRIMS), that are not permitted under WTO rules. However, if old investment licenses must be rewritten to eliminate onerous TRIMS requirements, firms run the risk that provisions that are favorable to their business, such as generous trading rights, might also be eliminated. Many companies would prefer to "grandfather" their old licenses.

STATUS OF DISTRIBUTION RIGHTS CURRENTLY MURKY IN DRAFT LEGISLATION

4. (SBU) Legal experts in HCMC are divided on how well legislation being drafted in preparation for Vietnam's accession to the World Trade Organization (WTO) addresses the issue of trading and distribution. In the area of trading, Fred Burke, managing partner of Baker & McKenzie Vietnam, expressed concern to EconOff regarding a draft Decree on Foreign Traders, which lists 15 categories of foreign companies that can engage in trading activities, including warehouse, logistics, retail, cosmetics and catering firms. Burke is concerned that if a company is not working in one of these 15 areas, then it will not be granted a license to trade directly, potentially narrowing the ability of U.S. companies to engage in trading.

15. (SBU) A decree on foreign traders that is being drafted in connection to the Commercial Law is also troubling to Burke. In addition to limiting trading activities to only 15 categories of companies (ref A), the decree will require companies to obtain an MOT license for each category in which a company wishes to trade. Burke said that besides being yet another example of a burdensome documentary requirement, it was unclear how this licensing process affects companies' obligation to be licensed by the Ministry of Planning and Investment (MPI). The decree also states that representative offices in place in Vietnam for more than three years will be "discouraged" so as to promote the formation of branches instead. Burke said the intention of this clause is unclear, and it introduces uncertainty into the system of rep offices, a system to which foreign companies have become accustomed. Finally, Burke noted an irony in the GVN drafting a decree on foreign traders at a time when it seeks to enter the WTO, where national treatment is a fundamental principle.

16. (SBU) In the area of distribution, Dao Nguyen, partner at Johnson Stokes & Master law firm in Vietnam, told EconOff in a separate meeting that, in her view, the new Commercial Law does not adequately provide for distribution services. It covers sales-purchase agreements and agents, which include aspects of distribution, but does not grant broad distribution rights in a way that would benefit the needs of Nguyen's clients, particularly foreign companies looking to distribute their goods directly in Vietnam. However, another HCMC lawyer, Sesto Vecchi, noted he had seen a draft decree linked to the Commercial Law that included provisions for distribution services. Dao Nguyen further observed that distribution is mentioned in the draft Common Investment Law, but rights under that law require regulations from the Prime Minister's office, which has not yet begun to draft such regulations. Due to unclear language in draft decrees on trading and distribution, there could be a conflict between the Ministry of Planning and Investment (MPI) and the Ministry of Trade (MOT) as to whether an investor can acquire distribution rights by amending its investment license from MPI or should apply to MOT for a separate distribution license, according to Embassy economic growth consultants in Hanoi. In their view, the legislation should be read to give an investor alternative ways to get distribution rights, but the two Ministries might want investors to get both licenses.

#### TRADING AND DISTRIBUTION RIGHTS KEY TO U.S. BUSINESS ACTIVITIES IN VIETNAM

17. (SBU) U.S. businesses in Vietnam rate the need for broad trading and distribution rights among their highest concerns in the run up to Vietnam's WTO accession. Mark Gillen, director of AIM, met with EconOffs and outlined the kind of expensive and inefficient mechanisms AIM endures to import and distribute goods legally in Vietnam for its clients, which include the likes of Johnson Wax and Sealy. AIM's representative office in Vietnam must work through a local company that in fact is completely supported by AIM and is located literally across the hall from AIM's office. The result is two companies with two management, accounting and receivables structures to handle the import and distribution of the same goods. Since the local company must show a profit and pay taxes, AIM must adjust the price of its goods to accommodate the financial needs of two companies. This two-company structure also limits the amount of financing AIM can obtain to grow its business. The local company can obtain some financing in Vietnam using inventory as collateral, but AIM, an American-owned and Hong Kong-registered company, finds it difficult to obtain more financing outside Vietnam; Hong Kong financial institutions, for example, demand a large amount of collateral for loans since AIM's inventory is in Vietnam and technically held by another company.

18. (SBU) COMMENT: Trading and distribution rights - both the BTA implementation and the prospects for broader rights under the WTO - are a continuing concern for U.S. firms in Vietnam. An August 12 USVTC report on the topic noted that Vietnam committed to extend trading rights at the May WTO working party meeting, except in areas like petroleum, pharmaceuticals, fertilizers, cultural products, and some agricultural products, which are already subject to lengthy phase-ins under the BTA. Representatives of U.S. companies in HCMC have told us on a number of occasions that Vietnam's commitments on trading and distribution in the WTO should be "BTA-plus" and should shorten or eliminate phase-ins for products like fertilizers, chemicals, pharmaceuticals and cultural products, all areas in which U.S. business is strongly competitive.

19. (SBU) Comment continued: These concerns are not new or unique to southern Vietnam. Firms such as Carrier and General Electric have been complaining to the Government of Vietnam (GVN) that the restrictions on their ability to import and distribute are significant obstacles to the success of their businesses. For Carrier, it means their air conditioning product line is limited to what they assemble in Vietnam. For GE, it means they have to hire a Vietnamese firm as an intermediary to distribute medical equipment, thus raising costs, reducing profits and making doing business more complicated. So far these firms continue to operate in Vietnam, but it is not easy. End comment.

